

No. 11954

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GARFIELD C. BARNETT,
Appellant

vs.

UNITED STATES OF AMERICA,
Appellee

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

PETITION FOR REHEARING

FILED

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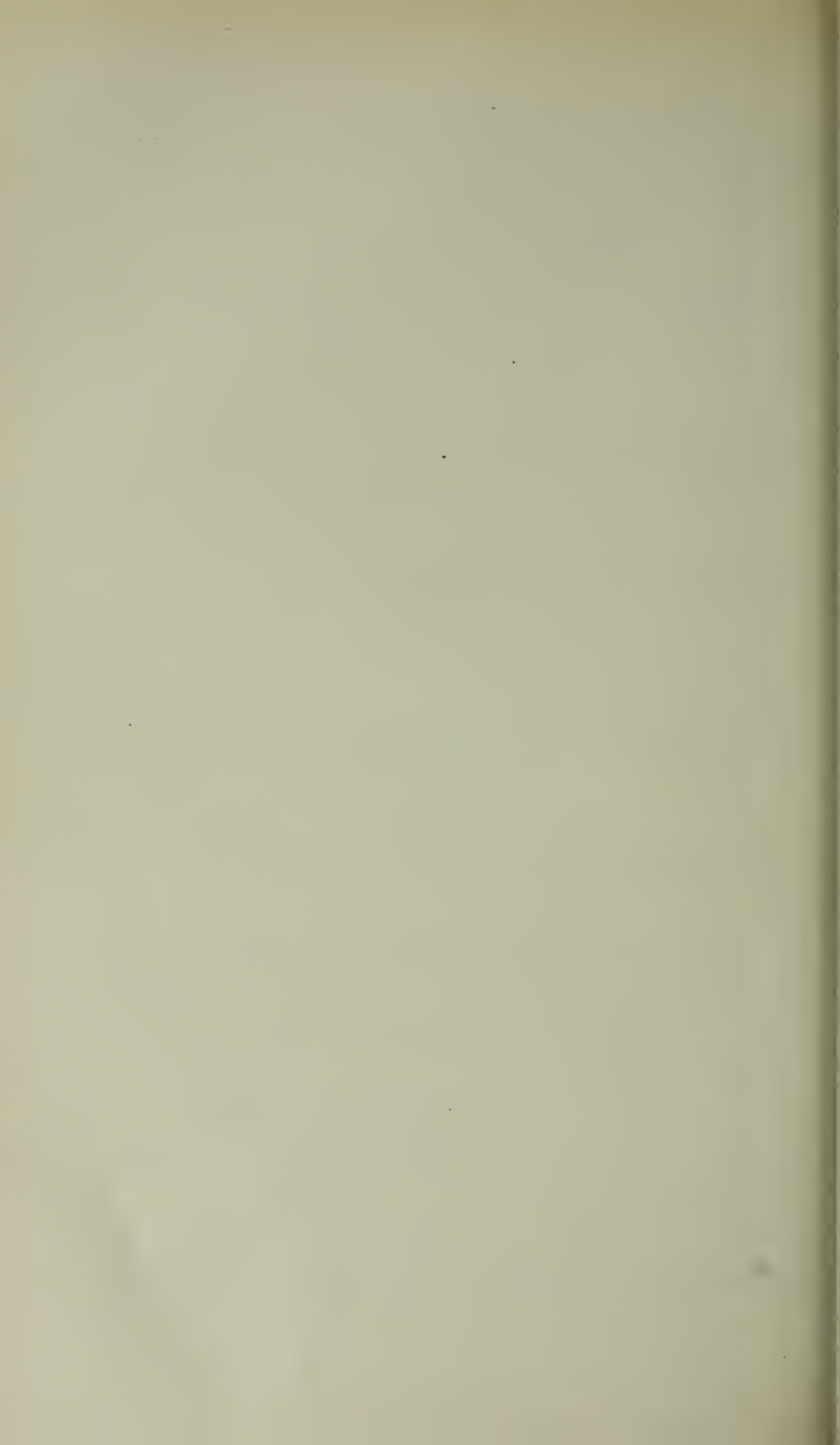
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Under authority of Rule 25, Rules of the U. S.
Circuit Court of Appeals, appellant, by and through
his undersigned attorneys, hereby petitions the Hon-
orable Court for a rehearing in the above entitled
cause in which the Judgment of Affirmance was filed
in this court on January 3, 1949.

The petition is filed for the following reasons and upon the following grounds:

This court, on page two of the printed opinion said that "the evidence discloses that Goode had possession of the box of narcotics, had taken one of the morphine quarter grains and examined the balance and had completed the transaction by stating that he would take them." The evidence does not disclose any such possession. In fact, the evidence establishes exactly the opposite. Goode testified (p. 89)* as follows:

"Q. What did you do?

A. I looked at the bottles in this cigar box and I had taken one of the morphine quarter grains. He got a piece of Kleenex and I poured them on the desk and I says, 'Well, it looks like all of the tablets are here. I will take it.' Then I showed him my badge and told him I was a Federal narcotic agent and he was under arrest."

From Goode's own testimony it is clear that any other examination he made of the contents of the box was made after he had arrested Barnett and not before. The court makes no mention of the fact that Neylon took some narcotics during the time Goode was supposedly in possession of them. If Agent Goode was in possession he must have seen Neylon remove

*Page numbers of printed transcript.

the narcotics before Neylon went out to call the other agents at the direction of Goode. Neylon admitted (pp. 71, 81, 82) taking the drugs during the time the court says Goode had possession of them. They were found on him by Agents Giordano and Graben. Goode admitted (p. 95) that he did not see Neylon take anything. Possession by Goode would have given him knowledge of the act of Neylon in taking some narcotics. It was physically impossible for Goode to have had possession and not known that Neylon took one of the bottles from the box. On the contrary, defendant Barnett informed the narcotics officers (p. 95) that Neylon had taken some narcotics from the box, a clear indication that Barnett had possession of the drugs and not Goode.

This court said that if Goode did not have actual possession, then it was constructive possession and delivery. This holding is in direct conflict with previous holdings of this and other courts. There is no such thing as constructive delivery and sale in connection with cash sales of the kind claimed herein. Constructive possession and delivery is limited in its application. When actual delivery, under the facts of the case, is possible, then constructive delivery is insufficient. Constructive delivery is only necessary where the goods are ponderous or bulky and can not

be conveniently delivered manually. *46 Am. Jur. Sec. 434*. Even then there is usually given or delivered to the buyer some indication of ownership or title to the property, such as a written matter.

At any rate, when an article such as the box of narcotics, which is very small, as in the instant case, is the subject of delivery, when actual, manual delivery was the easiest way of giving it to a buyer, then it would seem not to be law that a court should place the constructive delivery upon the article. When actual delivery is of the greatest importance in determining whether or not title to goods has passed under the facts in this case, it does not seem to be sound legal reasoning to say constructive delivery exists. The obvious answer is that if the parties intended to complete a sale, Barnett would have handed the drugs to Goode and then there would have been no question of delivery.

To hold that the facts of this case are delivery and transfer of possession places a strained construction on the cited cases and also makes new law, because no case has gone so far as the holding in this case. If we followed the logic of this opinion we have the following example as law: A goes in to B's store with \$302.00 (the amount Agent Goode had) in his pocket, and says he wants to buy a \$6000.00 diamond

ring. B says he has one and places it on the counter. A looks at it and says "I will take it". C immediately steps up and attaches the ring to satisfy a judgment he has against A. B objects to C's taking of the ring. However, under the holding in the opinion in this case, title has passed to A upon his statement of "I will take it". Constructive delivery must have been made and B's only redress is against A for as to B, an action will lie against A. In the meantime, C walks off with all the property.

To then press the case further, as the facts in the case at bar indicate, we find in the preceding hypothetical proposition that A never really had an intention to buy the ring (as Goode had no intention to buy the drugs (p. 95) but only that he wanted Barnett to make a sale of it. Such were the facts in the case at bar.

The cardinal factor upon which the passing of title between buyer and seller depends is the intention of the parties. The property is transferred to the buyer at the time the parties intended it to be transferred. This intention is determined by the terms of the contract, the conduct of the parties and the circumstances of the case. *46 Am. Jur. 413.*

From the evidence presented, it is obvious the parties did not intend to sell narcotics on anything

but a cash basis. Also, Goode endeavored always to falsely inform Barnett that he (Goode) had a great sum of money, at least \$6000.00 on his person. Also, it is obvious that Goode never intended to buy the narcotics. He talked of buying the drugs for cash (p. 95) which was impossible and therefore we must gather he did not intend to buy them at all. He did not at any time speak of buying them on terms other than cash.

When the party who is trying to sustain a sale (Goode) readily admits he had no intention of buying the narcotics, then there is really no need of going into the question of delivery because there was not even a contract to sell, the buyer having never intended to buy.

Obviously, the courts have never gone so far before as Your Honors have in this opinion. The law of sales is the same for both criminal and civil matters and should be so interpreted by this court.

To return to the opinion heretofore rendered by this court, if there had been a delivery, this court would have hastened to say so. Unable to find the delivery, the court then makes law by saying that a constructive possession and delivery is enough. The court cited no cases holding that constructive pos-

session and delivery are sufficient in cases of this type, and appellant has been unable to find any. This court has cited with approval the cases of *Hammer vs. U. S.*, 249 F. 336; *Fisk vs. U. S.*, 279 F. 12, and *Reyff vs. U. S.* 2 F. (2d) 39, and *Ahearn vs. U. S.*, 3 F. (2d) 808. In every one of the cited cases the court has used strong language in holding that an actual delivery had been made or that a payment of money had been made to complete the sale.

No money was paid and no delivery was made in the instant case. The court says that the facts in the case coincide very closely with those in the Hammer case, *supra*. In the Hammer case the narcotics were delivered by Hammer to an express company in a package addressed to and consigned to the purchaser in another state. Nothing in the instant case even remotely resembles such a delivery. There is nothing similar about anything else in the case except that narcotics were involved.

The court in Note Two of the opinion cites Williston on Sales and two cases thereunder. It must be pointed out that the cases cited dealt with acceptance and delivery of goods in conjunction with sight drafts, bills of lading, written memoranda, and are not in point as far as cash transactions are concerned. The sections cited in Williston on Sales deal with accept-

ance of goods on credit transactions and define a delivery as a voluntary transfer of possession from one person to another. Nothing in Williston or his cited cases changes the law as announced by this court in the opinion where it says "the law appears quite clear that a sale of this character is not complete unless either the purchase price has been paid or the property delivered."

This court has not given effect to its own pronouncement of the law. Instead, it has announced a new law, without citing enough facts of the case to establish precedent, of constructive possession and delivery in cash sales. No authority was cited for such holding nor can any be found in any known law, cases, or authorities.

A further oral argument was presented the court to the effect that in a sale absolutely for cash, title does not pass until the case is paid, along with the delivery of the goods. *46 Am. Jur. Sec. 448; 46 Am. Jur. Sec. 477; The Canadian Northern Railway vs. Northern Mississippi Railway*, 209 Fed. 758; *Johnson vs. Iankonetz*, 110 Pac. 398; *Rowe vs. Spencer*, 79 S.E. 144; *Johnson-Brinkham Co. vs. Central Bank*, 22 S.W. 813.

Whether or not a transaction is for cash is based upon the intention of the parties and circumstances of

the case. If a set of facts ever demanded cash sale, then the set before us for our consideration demanded it. The talk of buyer and seller also indicated it. Without payment of cash, all conditions by the buyer had not been met and title did not pass from the buyer to the seller.

For the foregoing reasons and upon the authorities cited appellant respectively prays that the decision rendered in this case be reconsidered, or that a rehearing be granted to the end that this court may give proper interpretation to the law as laid down by the courts.

Respectfully submitted,

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